TARGET EDGE SDN BHD v. ZET ENTERPRISE SDN BHD & ANOR

HIGH COURT MALAYA, SHAH ALAM
AKHTAR TAHIR J
[CIVIL SUIT NO: 22NCVC-251-05-2014]
15 JANUARY 2016

CONTRACT: *Agreement – Tenancy agreement – Extension of tenancy – Tenancy agreement terminated due to tenant's failure to give notice to extend tenancy – Tenant claimed that parties had orally agreed to renew tenancy before expiry of tenancy agreement – Allegation that tenant met with landlord's representative – Whether claim substantiated – Whether tenant could claim for specific performance of tenancy agreement – Whether notice of termination by landlord valid*

EVIDENCE: *Adverse inference – Failure to call material witness – Tenancy agreement – Extension – Tenancy agreement terminated due to tenant's failure to give notice to extend tenancy – Allegation that tenant met landlord's representative and parties orally agreed to renew tenancy before expiry of tenancy agreement – Alleged representative of landlord not called to court – Whether burden of proof laid on tenant's shoulders – Whether adverse inference ought to be invoked for non-calling of material witness – Evidence Act 1950, ss. 101 & 114(g)*

EQUITY: *Equitable interest – Tenancy – Tenanted premises upgraded by tenant – Claim for expenses and costs incurred – Whether tenant had any equitable rights over premise – Whether tenant observed and complied with all by-laws, rules and regulations of competent authority – Whether rule of equity applied – Whether tenant came to court with clean hands*

The plaintiff and the second defendant had entered into a tenancy agreement ('the agreement') for the rental of a premise belonging to the first defendant commencing from 1 March 2010 to 28 February 2013. Clause 8(e) of the agreement prescribed that the plaintiff shall notify the second defendant not less than six months from the expiry of the three years tenancy if he wishes to extend it, and further that, on receipt of this notice, the defendant shall extend the tenancy for another three years. Since there was no notice of renewal, the second defendant informed the plaintiff on 23 July 2013 that the tenancy had expired and that the latter could continue to occupy the premise as a tenant at will. The second defendant later issued a final letter of termination and demanded the plaintiff to hand over vacant possession of the said premise. The plaintiff contended that before the expiry of the agreement, its director had met and discussed with the second defendant's representative ('Khairulzaman') for the renewal of the tenancy period and both parties had orally agreed to renew the tenancy period from 1 March 2013 until 29 February 2016. The plaintiff filed the present action for, *inter alia*, a specific performance order to compel the second defendant to execute the tenancy agreement as per the terms orally-agreed. The plaintiff also pleaded

on the issue of its equitable interest over the premise, claiming that the value of the premise had increased when a double-storey building was added and erected by the plaintiff to the first defendant's premise together with a second access road and an upgraded electric power to supply from 200Amp to 1200Amp.

Held (dismissing claim):

(1) According to the plaintiff, it had notified its intention to renew the tenancy by informing and negotiating with one Khairulzaman but the second defendant denied this allegation. It was crucial that Khairulzaman be produced in court as a witness to clarify the actual position of the tenancy. The burden laid upon the plaintiff to prove its case on a balance of probabilities, as provided by s. 101 of the Evidence Act 1950 ('the Act'). However, the plaintiff made no attempts to call this crucial witness and instead contended that the witness should have been called by the defendant. By failing to call Khairulzaman, the plaintiff failed to discharge its burden of proof. An adverse inference could be drawn against the plaintiff under s. 114(g) of the Act. (paras 15, 16 & 17)

(2) The notice of termination given by the defendant to the plaintiff was valid and it effectively terminated the tenancy. Having failed to prove that it had notified the second defendant about its desire to extend the tenancy for a further period of three years, the plaintiff's occupancy of the premise could be regarded as tenancy at will. Being a tenancy at will, the tenancy could be terminated by a reasonable notice. The acceptance of the rental payment by the defendants after the termination did not constitute waiver on the defendants' side. (paras 20 & 21)

(3) The second access road was built at the plaintiff's own request and the second defendant, as a landlord, was only required to obtain the approval from the relevant authorities for the construction of the access road and nothing more. The second defendant was only responsible for providing electricity at a minimum of 200 Amp. Since there was already an existing 200Amp electricity supply to the premises, the plaintiff should bear all expenses and costs for the upgrade if it wanted a higher supply. (paras 23 & 24)

(4) Neither the building of the access road nor the extra supply of electricity or the building of the double-storey structure entitled the plaintiff to extend the tenancy. It did not give any equitable rights over the premise. The double-storey building was an illegal structure as the plaintiff carried on and constructed it without necessary approval. The plaintiff had breached an important clause in the agreement, namely to observe and comply with all by-laws, rules and regulations of any competent authority which may by time to time be in force. The rule of equity did

not apply in this case. The principle that a person seeking equity must come with cleans hands applied. The plaintiff had come to the court after seriously flouting the building laws. (paras 25 & 26)

Case(s) referred to:
C C Siah Properties Sdn Bhd v. Ang Kheng Huat [2012] 1 LNS 1289 CA ***(refd)***
SBB Securities Sdn Bhd v. Chan Kwan Foong [2013] 5 CLJ 590 CA ***(refd)***

Legislation referred to:
Evidence Act 1950, ss. 101, 114(g)

For the plaintiff - Goik Kenzu; M/s Ang & Joyce
For the defendants - Mohd Nor Darus; M/s Nasir, Kenzin & Tan

Reported by Najib Tamby

JUDGMENT

Akhtar Tahir J:

Facts Of The Case

[1] There was a tenancy agreement dated 1 March 2010 between the plaintiff and the second defendant ('the agreement') for the rental of a premise known as HSD 143326, PT No. 20, Jalan Dato' Menteri, Section 14, 40000, Shah Alam and the building erected thereon (the "said premise").

[2] The first defendant is the registered owner while the second defendant is the holder of lease on the said premise for 30 years from 1 July 2007 until 30 June 2037.

[3] The plaintiff after the execution of the agreement dated 1 March 2010 was given tenancy of the premise for a period of three years commencing from 1 March 2010 until 28 February 2013. The rental agreed upon was for the sum of RM75,000 per month. Upon executing the agreement the plaintiff had rented part of the premise to a number of sub-tenants under various sub-tenancy agreements.

[4] It was agreed under cl. 8(e) of the agreement that in the event the plaintiff is desirous of extending the tenancy beyond the three years, the plaintiff shall notify the second defendant not less than six month from the expiry of the three years tenancy. On receipt of this notice, the second defendant shall extend the tenancy for another three years subject to a 10% increase in the monthly tenancy.

[5] It was also agreed, under cl. 8(f) of the agreement that the plaintiff would be given another three terms of each three years tenancy subject to the notice given under cl. 8(e) of the agreement.

[6] The conflict between parties started when the second defendant had issued a letter to the plaintiff dated 23 July 2013 informing that the tenancy has expired as of 2 March 2013 as there was no notice to renew the tenancy

as provided under the agreement. The second defendant further informed the plaintiff that the plaintiff could continue to occupy the premise as a "tenant at will" at the discretion of the second defendant.

[7] The second defendant further issued a final letter of termination on 6 February 2014 and demanded the plaintiff to hand over vacant possession of the said premise.

[8] The plaintiff on the other hand contended that before the expiry of the first tenancy agreement, the plaintiff's director has met and discussed with the director or representative of the second defendant known as Encik Khairulazaman bin Abdul Rahman for the renewal of the tenancy period.

[9] The plaintiff further contended that both parties had orally agreed for the tenancy period to be renewed from 1 March 2013 until 29 February 2016 with the increment of the rental payment to RM82,500 per month starting from 1 January 2014.

[10] The plaintiff had also pleaded on the issue of the plaintiff's equitable interest over the premise as the value of the premise had increased when a double storey building was added and erected by the plaintiff to the first defendant's premise together with an access road and an upgraded electric power supply from 200 Amp to 1200 Amp.

[11] Therefore as a whole, the plaintiff had prayed *inter alia* for the followings:

a) A declaration that there was a tenancy agreement binding both parties to the suit;

b) A specific performance order to compel the second defendant to execute the tenancy agreement as per the terms orally agreed;

c) Costs of erecting the two storey building to the total sum of RM564,280.40;

d) Damages for the lost of rental to the sum of RM5,887,200; and

e) Cost of RM720,551.28 for building an access road and upgrading electricity supply, generator and diesel.

[12] In response, the defendants in their counter-claim asked for among others the following reliefs:

a) Termination of the tenancy agreement dated 1 March 2010 to be enforceable from 1 March 2010 itself;

b) An order for vacant possession of the said premise;

c) An order that the plaintiff is restrained from entering into any agreement with any of the plaintiff's sub-tenants;

d) An order that any tenancy agreement entered into by the plaintiff and it's sub-tenants is of no effect and invalid;

e) An order that the plaintiff or its agent be restraint from entering into the said premise and further restraint from preventing the defendants from collecting rental;

f) Damages of RM300,000 as payment for penalty from Shah Alam City Council;

g) Rental arrears of RM120,000 to be calculated at the rate of RM7,500 a month from 1 March 2013 until the date of filing of this writ on 25 July 2014;

h) Rental arrears of RM330,000 until January 2015;

i) Deposit paid by the sub-tenants to the plaintiff to the total sum of RM380,000 until January 2015;

j) Rental profit from the sub-tenants for the sum of RM713,600 to be calculated as RM44,600 per month from 1 March 2013 until the date of this writ dated 25 July 2014;

k) Payment of rental from the sub-tenants to the total amount of RM44,600 per month from the date of writ until the date of the court's order;

l) Payment of monthly rental to the amount of RM82,500 or the monthly rental from the sub-tenants to the amount of RM127,100 a month as "tenant at will" from the date of this writ until the date of handing over vacant possession of the said premise to the defendants;

m) General and special damages; and

n) Double rental to the amount of RM165,000 per month from 1 March 2013 until the date of handing over vacant possession.

Issues To Be Decided By The Court

[13] I found that the main issue to be decided that would satisfy all claims is whether the termination of the tenancy by the second defendant valid beyond the three years term when no notice for renewal had been given by the plaintiff as alleged by the second defendant?

Findings Of The Court

[14] This issue revolve around as to whether the plaintiff had complied with the provision of cl. 8(e) of notifying the second defendant of the intention to renew the tenancy.

[15] It is to be noted in this case that there is nowhere in the clause which requires the notification must be in writing. Giving a liberal interpretation of this clause, it is my decision that a written notification of extension is not required. It suffices if the plaintiff notifies in any manner his intention to renew the tenancy. In this case, the plaintiff testified that he had notified its intention to renew the tenancy by informing and having negotiation with a person named Khairulazaman who happened to be one of the directors' of

A the second defendant and seemingly the liaison officer for the second defendant. The second defendant in their testimony denied of having appointed or intended the said Khairulazaman to negotiate the renewal of the tenancy with the plaintiff.

B **[16]** In light of this diverse position taken up by both parties, it is crucial that the person called Khairulazaman be produced in court as a witness to clarify the actual position with regards to the tenancy. The burden lies upon the plaintiff to proof it's case on a balance of probabilities and this is in line with s. 101 of the Evidence Act 1950 which imposes a duty upon the person alleging a fact to proof that fact.

C **101 Burden of proof**

(1) Whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist.

D (2) When a person is bound to prove the existence of any fact, It is said that the burden of proof lies on that person.

[17] In this case the plaintiff made no attempts to call this crucial witness and instead contended that the witness should have been called by the defendants. By the plaintiff failing to call this witness the plaintiff has failed E in discharging its burden of proof as envisaged under the Evidence Act. A more serious consequence of non calling of this witness is that an adverse inference can be drawn against the plaintiff under s. 114(g) of the Evidence Act. The adverse inference being that if this witness had been called he would have testified against the plaintiff.

F **[18]** The Court of Appeal in the case of *SBB Securities Sdn Bhd v. Chan Kwan Foong* [2013] 5 CLJ 590 has this to say on the principle of adverse inference:

(2) It was the burden of the appellant to tender all the relevant documents and to call the remisier to testify during trial. In the present case, there was no evidence of any writing or document produced by the appellant G to show that the respondent had made such an order or instruction in the written form. The remisier, who would be in the best position to enlighten the court as to whether the respondent had made an order or instruction orally, had also not been subpoenaed to testify in court. The failure by the appellant to do so would attract the adverse inference under s. 114(g) of the Evidence Act 1950. (paras 14 & 18).

H **[19]** Another case which can be applied as a guide for the principle of adverse inference is the case of *C C Siah Properties Sdn Bhd v. Ang Kheng Huat* [2012] 1 LNS 1289 which expounded as follows:

[90] In my view, the learned trial judge, with respect, should have drawn I an adverse inference against the defendant by reason of his failure to call the so-called Dr Tan Poh Choon and Ms Sing Mei Ling as defence witnesses. It is to be appreciated that it is the defendant who brought into the picture the role of the said Dr Tan Poh Choon. And it is the

defendant who is alleging that Sing Mei Ling had attested the signatures of PW1 and PW2 in the alleged SPA. In other words, the learned trial judge should have invoked the presumption under s. 114(g) of the Evidence Act 1950 against the defendant.

[20] The plaintiff having failed to prove that it had notified the second defendant about its desire to extend the tenancy for a further period of three years. The court agrees with the contention of the second defendant that the plaintiff's occupancy of the premise could be regarded as "tenancy at will". Being a "tenancy at will" the tenancy can be terminated by a reasonable notice being given. In consequence I ruled that the notice of termination dated 6 February 2014 given by the second defendant to the plaintiff is valid and it effectively terminates the tenancy.

[21] I further ruled that the acceptance of the said payment for rental by the defendants after the termination of the said tenancy does not constitute a waiver on the defendants' side. This has been clearly emphasised in cl. 8(h) of the agreement that the acceptance of rent by the landlord shall not be deemed to operate as waiver by the landlord of any rights to proceed against the tenant of any of the tenant's covenant and obligations herein obtained.

[22] The plaintiff in the alternative contends that the second defendant is estopped from terminating the tenancy as it had represented to the plaintiff that it could occupy the premises for a period of 15 years. Further the defendants are estopped by equity in terminating the tenancy as the plaintiff had spend a considerable sum of money in building an access road to the land as well as building a new double storey structure on the land as well as upgrading the electric voltage to the premise.

[23] It is evidence in this case that the second access road was built at the plaintiff's own request. The second defendant as a landlord under cl. 5(a) of the agreement was only required to obtain the approval from the relevant authorities for the construction of the access road and nothing more.

[24] Similarly, under cl. 5(a), the second defendant as a landlord was only responsible to provide electricity at a minimum of 200 Amp. In this case, the plaintiff had applied and received an approval to be supplied with additional electricity of 1000 Amp. For this purpose, the plaintiff had paid additional deposit sums to TNB in which it is my decision that since there is already an existing 200 Amp electricity supply to the premises, if the plaintiff wanted a higher supply, then the plaintiff should bear all expenses and costs for the upgrade.

[25] From the evidence, it is also clear that the plaintiff had carried on and constructed a double storey structure on the land without necessary approval. Clearly this double storey structure is an illegal structure and I therefore agreed with the contention of the defendants that the plaintiff had breached an important clause in the agreement, namely to observe and comply with all by-laws, rules and regulations of any competent authority which may by

time to time be in force, which has been stipulated under cl. 6(i) of the said agreement. In addition to that, the plaintiff shall at all time prior to entering into the said tenancy agreement be aware of cl. 6(r) that the tenant shall be entitled at its own costs and expenses to renovate the buildings on the demised premises.

[26] It is my decision in this case the rule of equity does not apply and even if it applied the principle that the person seeking equity must come with clean hand applies. In this case the plaintiff had come to court after seriously flouting the building laws and in the process endangering the lives of the sub-tenants. I accepted the evidence of the defendants that this was one of the main consideration in terminating the tenancy apart being threatened by the Local Authority to be hauled up for blatantly disregarding notices sent by the Local Authority on the safety of the premise.

[27] In short, neither the building of the access road nor the extra supply of electricity or the building of the double storey structure entitled the plaintiff to extend the tenancy neither did it gave the plaintiff any equitable rights over the premise. It is further a decision of this court that all rights and obligation of the parties in this case are subject to the provisions of the tenancy agreement between the parties. There are no extenuating circumstances allowing this tenancy agreement to be circumvented.

[28] Taking into account the above factors I dismissed the plaintiff's claim against the defendants with a cost of RM35,000.

[29] I further allowed the counterclaim of the defendants with a cost of RM20,000 and allowed the following relief sought by the defendants:

i) an order for the termination of the tenancy agreement effective from 1 March 2013 after which the plaintiff held the tenancy as a tenant at will until the notice of vacant possession issued by the defendants;

ii) immediate surrender of vacant possession of the premise;

iii) the plaintiff was restrained from entering into any sub-tenancy agreement with any sub-tenants. Any sub-tenancy agreement between the plaintiff and the sub-tenants from the date of the notice of vacant possession was deemed to be not valid;

iv) the plaintiff or his agents and workers were barred from entering the premise or in any way obstruct the plaintiff from entering and using the premise or collect rentals from the sub-tenants;

v) the plaintiff was ordered to return the payment of rentals to the defendants amounting to RM44,600 a month paid by the sub-tenants to the plaintiff from the date of notice of vacant possession 6 February 2014 issued by the defendants to the date of the judgment of court on 13 November 2015;

vi) the plaintiff immediately pays the arrears of rental to the amount of RM90,000 to the second defendant; and

vii) the plaintiff ordered to pay the defendants double rental to the amount of RM165,000 from the date of notice of vacant possession dated 6 February 2014 to the delivery of vacant possession to the defendants.